United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Original with Affidavit of Mailing

74-2310

To be argued by
GARY A. WOODFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2310

UNITED STATES OF AMERICA,

Appellee,

—against—

JOHN RUFUS ETHERIDGE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
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Preliminary Statement

John Rufus Etheridge appeals from a judgment of conviction, entered October 4, 1974, in the United States District Court for the Eastern District of New York, following a trial by the court without a jury (Mishler, *Ch. J.*). Appellant was convicted of falsely personating an employee of the United States, and in such pretended character, demanding and obtaining a sum of money (Title 18, United States Code, Section 912). On October 4, 1974, appellant was sentenced to three years probation, execution of which was stayed pending this appeal.

Appellant contends that his impersonating a Sergeant in the United States Army, and, while in that falsely assumed capacity, obtaining a loan of $200.00 from Army Emergency Relief, was not conduct violative of Title 18, United States Code, Section 912.

Statement of Facts

(1)

Appellant waived his right to a trial by jury and no witnesses were called by either the Government or appellant. The case was submitted to the District Court for determination on the following stipulated facts:

1) On July 23, 1973 John R. Etheridge went to Headquarters Company of the United States Army Chaplain School, Fort Hamilton, Brooklyn, New York and there obtained a request for leave form which he completed.

2) Etheridge then proceeded to the Identification Section where he obtained a temporary ID card after explaining to the personnel that he was a current member of the Army on leave and had his wallet with all identification stolen.

3) Next, Etheridge went to Army Emergency Relief where he submitted an application for financial assistance, identifying himself as a current member of the U. S. Army, 552 Engineers, Fort Knox, Kentucky with a home of record as 4165 Farlin Avenue, St. Louis, Missouri.

4) At Army Emergency Relief Etheridge informed employees that he required financial assistance because he was a member of the Army on a 30 day leave (as indicated on the leave form he had previously obtained and completed) and was robbed on July 21, 1973 of his wallet which contained $175 in currency, Military ID card, and various credit cards. Etheridge stated that he needed $200 to pay his hotel bills and return to Kentucky.

5) At this time, Etheridge was in possession of papers from the New York City Police Department, 25th Precinct, indicating that he had lost his wallet on July 21, 1973.

6) Etheridge also had in his possession the temporary ID card he had obtained at Fort Hamilton previously on this day, July 23, 1973.

7) Army Emergency Relief authorized a loan to Etheridge for $200 which was given to him in the form of a check on July 24, 1973. Etheridge cashed this check at the Post Exchange at Fort Hamilton.

8) On July 24, 1973 Etheridge again returned to the Identification section at Brooklyn Army Terminal where he obtained a permanent U. S. Army duty identification card.

9) Etheridge then proceeded to the Base Finance Office and received $65 in partial pay.

10) On July 26, 1973 Etheridge again went to the Base Finance Office attempting to obtain another partial pay. At this time he was detained by the Criminal Investigation Division who advised him to surrender to the F.B.I.

11) On July 27, 1973 Etheridge surrendered himself to the F.B.I. at which time he gave a full statement of the foregoing facts.

12) Throughout the time of these events Etheridge was not a member of the U. S. Army.

13) Monies of the Army Emergency Relief are not United States Government funds. Only active duty and retired military personnel and their dependents are entitled to Army Emergency Relief monies.

14) Etheridge completed and signed an allotment document agreeing that $200.00 be withdrawn from his August 1973 Army paycheck and be repaid to Army Emergency Relief.

(2)

Based on the foregoing facts, appellant argued in the District Court for a judgment of acquittal contending that his conduct did not constitute a violation of Title 18, United States Code, § 912. Appellant contended that § 912 requires not only that one pretends to be an officer

or employee of the United States, but also that the thing of value demanded and obtained be so demanded and obtained pursuant to the duties of the pretended officer or employee. Appellant argued that although he did impersonate a United States Army Sergeant, he was at all times acting in a personal capacity in obtaining the loan; thus, his conduct was not violative of § 912.

In a decision dated June 7, 1974, Chief Judge Mishler rejected this interpretation of § 912 and found appellant guilty as charged (App. C).

ARGUMENT

The District Court Properly Found Appellant's Conduct Violative of Title 18, U.S.C. § 912

On stipulated facts, appellant concedes that he pretended to be a Sergeant in the United States Army and, in such a pretended capacity, fraudulently obtained an Army Emergency Relief loan of $200.00. Appellant contends, however, that his conduct does not constitute a violation of § 912. Interpreting § 912 to require not only the impersonation of a Federal employee, but also the demanding and obtaining something of value pursuant to the authorization of this pretended capacity, appellant contends that his conduct was not violative of § 912, since he was acting solely in a personal capacity. This interpretation of § 912 was properly rejected by the District Court.

Title 18, United States Code, § 912 provides as follows:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

Section 912 defines two separate and distinct offenses. *United States* v. *Lepowitch*, 318 U.S. 702 (1943); *United States* v. *Rose*, 500 F.2d 12, 15 (2d Cir. 1974); *United States* v. *Mitman*, 459 F.2d 451, 453 (9th Cir. 1972); *United States* v. *Milton*, 421 F.2d 586, 587 (10th Cir. 1970). The first offense is the false personation of an officer or employee of the United States and acting as the officer or employee impersonated. See, *United States* v. *Lepowitch*, *supra* at 703; *Lamar* v. *United States*, 241 U.S. 103, 114 (1916); *United States* v. *Harmon*, 496 F.2d 20, 21 (2d Cir. 1974). The second offense is the false personation of an officer or employee of the United States and in such pretended capacity, demanding or obtaining a thing of value. See, *Lamar* v. *United States*, *supra*; *United States* v. *Barnow*, 239 U.S. 74, 77 (1915). Appellant was convicted of the second offense contained in § 912.

The interpretation of § 912 which appellant urges was specifically rejected by the Supreme Court in *Lamar* v. *United States*, *supra*. In *Lamar*, the defendant assumed the status of a United States Congressman, and acted in that capacity. He was convicted of the first offense of the predecessor statute of § 912. The Supreme Court rejected defendant's contention that the act he performed in the falsely assumed capacity must be one that he would have been authorized to do had he actually possessed the capacity which he assumed. The Court in *Lamar* v. *United States*, *supra* at 114, concerning this interpretation stated:

> . . . it misconceives the statute and fails to give it proper effect because when rightly construed the operation of the clause is to prohibit and punish the falsely assuming or pretending, with intent to defraud the United States or any person, to be an officer or employee of the United States as defined in the clause and the doing in the falsely assumed character any overt act, whether it would have been legally authorized had the assumed capacity existed or not, to carry out the fraudulent intent.

In explaining the rationale for this interpretation, the Court in *Lamar* stated (id., at 114):

> . . . the words "acting under the authority of the United States" are words designating the character of the officer or employee whose personation the clause prohibits since if the words are thus applied, the clause becomes coherent and free from difficulty, while if on the other hand they are applied only as limiting and defining the character of the overt act from which criminality is to arise, confusion and uncertainty as to the officer or employee whose fraudulent simulation is prohibited necessarily results.

Therefore, it is clear that the Court's interpretation in *Lamar* of the phrase ". . . acting under the authority of the United States . . ." is inapposite to appellant's interpretation. That phrase does not limit the character of the second requirement of the two offenses included in § 912, that is, an overt act or, in this case, demanding or obtaining something of value. See also *United States* v. *Barnow, supra* at 77; *United States* v. *Hamilton,* 276 F.2d 96, 98 (7th Cir. 1960).

A further examination of the case law and a review of the legislative history supports the applicability of § 912 to the present case. The legislative history of § 912 indicates a Congressional intent to punish persons who falsely represent themselves as officers or employees of the United States. 14 Cong. Rec. 3238 (1883). The Courts, in construing § 912 and its predecessors, have ascribed a two-fold purpose to the statute: (1) to protect innocent persons against fraud, and (2) to preserve the dignity and good repute of the federal government. See, *United States* v. *Lepowitch, supra* at 704; *United States* v. *Barnow, supra* at 80; *United States* v. *Wight,* 176 F.2d 376, 378-379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950). The gist of the offense, however, is the false personation of a federal officer

or employee. See, *Lamar* v. *United States, supra* at 114; *United States* v. *Barnow, supra; Reed* v. *United States,* 252 F. 21, 23-24 (2d Cir. 1918). Certainly appellant's false personation of a federal employee and using this impersonation to fraudulently obtain money, was conduct detrimental to the dignity and good repute of the federal government, and as such, was conduct Congress sought to prohibit through the enactment of § 912.

Further, appellant's reliance upon *United States* v. *York,* 202 F. Supp. 275 (E.D. Va. 1962), and *United States* v. *Grewe,* 242 F. Supp. 826 (W.D. Mo. 1965), to support the contention that his conduct was not violative of § 912 is misplaced. The instant case is clearly distinguishable from *York* and *Grewe.*

In *United States* v. *York, supra,* the defendant, a teenaged girl, falsely gave her employment as a clerk with the F.B.I. in applying for credit at a retail store. The district court, holding that the defendant's actions did not constitute a violation of § 912, stated (202 F. Supp. at 277):

> [S]he did not ask the credit manager for credit *because* she was an employee of the F.B.I. and she was in no sense *acting* in the pretended character of an employee of the F.B.I. She had asked for the dress and for credit before the question of employment ever came up. She merely thought that she would be more apt to get the dress if she stated that she had some employment and her status as an applicant for a job with the F.B.I. was the nearest thing to a job that she had. (emphasis in original).

The court in *York* noted that it appeared from the evidence at trial that the defendant's employment with the government would have carried no additional influence in her obtaining credit. The district court, in finding for the

defendant, held that the defendant did not satisfy the second requirement of § 912, that is, she did not obtain the dress ". . . in such pretended character . . ." .

In *United States* v. *Grewe, supra,* the defendant cashed various checks at a hotel which were eventually returned unpaid. Under her signature on these checks, the defendant falsely indicated she was employed by the United States Army. In *Grewe,* as in *York* there was no nexus shown between the impersonation and the fraud. The District Court dismissed the indictment on the authority of *United States* v. *York, supra* at 829.

In the instant case, appellant falsely represented himself to be an employee of the United States, and while *acting* in this pretended capacity, obtained a loan from Army Emergency Relief. Contrary to *York,* appellant sought and obtained this loan *because* of the role he falsely assumed. Monies from the Army Emergency Relief are available only to a limited class, and appellant's false representation that placed him within this class was the only reason he was able to obtain the loan. Certainly this is distinguished from *York,* where the court stated that the falsely represented government employment had no additional influence in the defendant obtaining a dress.

The gravamen of the offense is the use of the impersonated capacity of a U.S. government employee in order to gain something of value. *United States* v. *Wight, supra* at 379. Here, appellant falsely assumed the status of an Army Sergeant and in this capacity obtained financial assistance. This assistance could not have been obtained by appellant had he not falsely assumed a position with the United States Army. The nexus was clear and direct. Appellant's actions constitute a violation of § 912 and thus, Chief Judge Mishler properly found appellant guilty as charged.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
January 17, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
GARY A. WOODFIELD,
Assistant United States Attorneys,
Of Counsel.

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LYDIA FERNANDEZ being duly sworn,

and says that he is employed in the office of the United States Attorney for the Eastern of New York.

on the 17th day of January 19 75 he served a copy of the within

Brief for the Appellee

ng the same in a properly postpaid franked envelope addressed to:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Court House
Foley Square, New York, N. Y. 10007

nent further says that he sealed the said envelope and placed the same in the mail chute mailing in the United States Court House, Washington Street, Borough of Brooklyn, County City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

before me this

day of January 19 75

OLGA S. MORGAN
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No. 24-5011966
Qualified in Kings County
ission Expires March 30, 19